No. 89-194

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

HENRY VANCE,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF OF PETITIONER

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October 16, 1989

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1. The United States attempts to downplay the conflict between the exclusionary and inclusionary approaches followed in different circuits to admission of Rule 404(b) evidence by arguing that the cases cited to show the conflict "were all decided before" *Huddleston* v. *United States*, 108 S.Ct. 1496 (1988). According to the United States, *Huddleston* "confirms" that the inclusionary approach "is the correct approach." Opp. 6. But, *Huddleston* did not address the issue of legal standards for admission of evidence under Rule 404(b). Instead, that case presented the narrow question of "whether the dis-

trict court must itself make a preliminary finding that the government has proved the 'other act' by a preponderance of the evidence before its submits the evidence to the jury." 108 S.Ct. at 1497.[1]

The language in the opinion in *Huddleston* on which the United States places primary reliance (Opp. 6) simply "reject[ed] petitioner's position" that the "jury ought not to be exposed to similar act evidence until the trial court has . . . made a determination . . . that the defendant committed the similar act." 108 S.Ct. at 1500.[2] It is misleading, at best, to assert that *Huddleston* was intended, or could plausibly be read, to resolve the conflict in the circuits regarding the standards for admission of similar acts evidence.

The real relevance of the *Huddleston* opinion lies in the Court's statement that "the protection against . . . unfair prejudice" lies in "the requirement of Rule 404(b) that the evidence be offered for a proper purpose . . . ." 108 S.Ct. at 1502. Instead of respecting the Court's "concern" over such unfair prejudice (see *id.*), the Sixth Circuit has adopted an interpretation of Rule 404(b) that encourages the government, primarily in cases involving persons of good reputation, to introduce as much "bad acts" evidence as possible to show that the defendant has

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[1] The United States does not directly contest the existence of the conflict which is recognized by the commenators on the Federal Rules of Evidence and is apparent in the case law itself. Pet. 12-18.

[2] The United States quotes the statement by the *Huddleston* Court that "Rule 404(b), for example, protects against the introduction of extrinsic act evidence when that evidence is offered solely to prove character." 108 S.Ct. at 1500. But, the Court's next sentence makes clear that its comment was intended merely as an *example* of the operation of the Rule and not—as the United States' suggests—a conclusive enunciation of Rule 404(b) standards: "The text contains no intimation, however, that any preliminary showing is necessary before such evidence may be introduced *for a proper purpose*." *Id.* (emphasis added)

"motive" to commit crimes. In doing so, the court of appeals has allowed a narrow inclusionary exception in Rule 404(b) to swallow the exclusionary rule and thereby ensured that many defendants will be exposed to the very type of highly prejudicial evidence that Congress intended to exclude.

2. The United States' only other response to the petition is an argument that the Sixth Circuit was correct in admitting what is concededly an enormous amount of collateral "bad acts" evidence for the purpose of demonstrating petitioner's "motive." According to the United States, the

> evidence served to show that, notwithstanding the improbability that someone of petitioner's apparent prominence would assist in a murder, petitioner had a motive for supplying the pistol to Bonnie Kelly.

Opp. 5-6. Not surprisingly, the United States—like the Sixth Circuit—makes absolutely no effort to explain what petitioner's "motive" was for this specific crime. Instead, the government simply repeats—by our count, 14 times—the asertion that the evidence was relevant to show "motive," as though saying it often enough will make it so.

In fact, the evidence of petitioner's prior "bad acts" had *nothing* to do with "motive." As the United States' own explanation shows, the only purpose and effect of the evidence was to undermine and refute petitioner's "prominence" in Kentucky, *i.e.*, his good character and reputation. All that the "bad acts" evidence could have "proved" is that petitioner is the type of person who might commit *any* crime. The evidence proves nothing about his motive (*i.e.*, incentive) to commit the specific crime with which he was charged. The use of "bad acts" evidence below—to suggest that petitioner was a "bad" person—is flatly inconsistent with Congress' intent, as reflected in Rule 404(b) and is precisely the opposite of

the approach of the District of Columbia Circuit in *United States* v. *Foskey*, 636 F.2d 517 (1980). See Pet. 17-18.

3. In sum, the decision below represents a totally "inclusionary" approach to Rule 404(b) evidence. As such, the decision is in conflict with decisions of other courts of appeals that have adopted more restrictive views of the proper interpretation of that Rule. See Pet. 12-17. Because of the strong likelihood that evidence of prior bad acts will have a determinative impact in federal criminal trials, it is fundamentally unfair to subject a defendant, such as petitioner, to a trial based largely on evidence of prior "bad acts" simply because that defendant has the misfortune of living within the Sixth Circuit.

CONCLUSION

For the foregoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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